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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13
14 LOOP AI LABS INC.,

15 Plaintiff,

16
17 v.

18 ANNA GATTI, et al,

19 Defendants.
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CASE NO.: 3:15-cv-00798-HSG-(DMR)

**PLAINTIFF LOOP AI LABS INC.'S
NOTICE OF MOTION AND MOTION
TO DISQUALIFY FORMER ORRICK
ATTORNEY STERNBERG AND HIS
NEW FIRM VENABLE LLP**

Date: November 5, 2015

Time: 2:30p.m.

Action Filed: February 20, 2015

Trial Date: July 11, 2016

Hon. Haywood S. Gilliam, Jr.

Hon. Donna M. Ryu

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 5, 2015, at 2:30p.m. or as soon thereafter as this matter may be heard in the courtroom of the Honorable Haywood S. Gilliam, Jr., located in the United States District Courthouse, 450 Golden Gate Avenue, Courtroom 15, San Francisco, California, or, in the event the Motion is referred to the Honorable Donna M. Ryu, in Courtroom 4, 1301 Clay Street, Oakland, California on a date and at a time to be advised by the Court, Plaintiff Loop AI Labs Inc. (“Loop AI”) will and hereby does move for the disqualification of (1) former Orrick Herrington & Sutcliffe LLP (“Orrick”) partner, now Venable LLP partner, Peter Sternberg, Esq. (“Attorney Sternberg”), and (2) Venable LLP from the representation in this litigation of Defendants Almaviva S.p.A., Almaxwave S.r.l., and Almaxwave USA Inc. (together “Almaxwave”), and further moves for entry of appropriate prophylactic measures to address Attorney Sternberg’s continuation of his conflicted representation of Almaviva in this litigation. In support of this Motion, Loop AI respectfully submits the accompanying Memorandum of Points and Authorities, the Declaration of Loop AI dated September 16, 2015 (“GMC Decl.”), the Declaration of Loop AI’s counsel dated September 16, 2015 (“VCH Decl.”), and all other matters already of record with the Court, or of which the Court may take judicial notice, and any further argument or evidence that may be received by the Court in connection with this Motion.

GROUND FOR THE MOTION

The basis for this motion is the past and present employment of Attorney Sternberg, a senior attorney who was a member of the Orrick partnership until earlier this year, and now is a partner of Venable.¹ Orrick began representing Loop AI in April 2012. Orrick’s representation of Loop AI continued without interruption until Orrick’s sudden withdrawal, communicated to Loop AI on March 11, 2015. Throughout this time Orrick was Loop AI’s primary counsel in connection with virtually all aspects of Loop AI’s business. Of particular relevance here,

¹ As more fully discussed below, Loop AI does not know whether Attorney Sternberg continues to have any financial or other relationship with Orrick.

1 Orrick's representation of Loop AI covered employment matters and matters related to the
2 issuance of Loop AI stock and included Loop's employment of Defendant Gatti and its issuance
3 of stock to her. The Orrick attorneys who did most of the work on the Loop AI account were
4 members of Orrick's Corporate practice group. While Orrick represented Loop AI—and until
5 he left Orrick in or around February 2015— Attorney Sternberg was also a senior member of
6 Orrick's Corporate practice group and worked closely with several of the same Orrick attorneys
7 who worked on the Loop AI account. Throughout the time of Orrick's representation of Loop
8 AI, as an Orrick partner, Attorney Sternberg owed Orrick's client Loop AI an undivided duty of
9 loyalty and was required to act at all times in the interest of, and not adversely to, Loop AI.

10 On March 27, 2014, while he remained a partner at Orrick (and approximately one year
11 before he left Orrick for Venable), Attorney Sternberg undertook the concurrent adverse
12 representation of Almaviva S.r.l. and provided its representatives substantial assistance in crucial
13 aspects of the wrongdoing alleged in this action. Attorney Steinberg and the team of Orrick
14 attorneys headed by him helped Almaviva S.r.l. to negotiate and implement agreements with
15 Anna Gatti that required Gatti to breach various contractual and fiduciary obligations owed by
16 Gatti to Orrick's client Loop AI (including obligations owed pursuant to the employment
17 agreement with Gatti that was drafted by Orrick for its client Loop AI). As more fully set forth
18 in the accompanying Memorandum, Orrick's conflicted concurrent adverse representation of
19 Almaviva S.r.l. would not have happened if Attorney Sternberg had followed proper conflict
20 clearance practice. During his impermissibly conflicted representation of Almaviva while he
21 was at Orrick, Attorney Sternberg dealt directly with Anna Gatti, who throughout that period of
22 time was Loop AI's CEO and later President. In that capacity, Gatti had access to virtually all of
23 Loop AI's confidential information, including its attorney-client privileged information and
24 advice received from Orrick. Thus, for almost one year, Attorney Sternberg had direct and
25 extensive access to confidential and privileged information of Loop AI both from within Orrick,
26 as well as through Anna Gatti.

27 In February 2015, after Ms. Gatti was terminated by Loop AI and Loop AI discovered the
28 wrongdoing alleged in this action, Attorney Sternberg elected to continue his conflicted

1 representation of Almagiva from another firm, Venable. Attorney Sternberg was not permitted
 2 to begin, let alone continue, his conflicted representation of Almagiva against Loop AI. The
 3 taint of Sternberg's almost one-year long representation, could not be suddenly removed by
 4 changing firms and continuing to conceal from Loop AI his role in the case. In addition to his
 5 having had unfettered access to Loop AI's privileged and confidential information, Attorney
 6 Sternberg is personally and materially implicated in this case, including by his having provided
 7 substantial assistance to Almagiva and Gatti in inducing and facilitating Gatti's breaches of her
 8 obligations to Loop AI. Because of his role in the wrongdoing alleged in this case, Attorney
 9 Sternberg faces personal liability to multiple parties involved in this case and he never should
 10 have continued his conflicted representation in this litigation whether alone or through Venable.

11 Because Venable admits that Attorney Sternberg has been personally working on this
 12 litigation since he moved to Venable,² his conflicts must be imputed to Venable, and
 13 disqualification of the entire firm is appropriate under any one of the three independent grounds
 14 discussed in the accompanying Memorandum of Points and Authorities.

15 **ATTEMPTS TO RESOLVE THE ISSUE WITHOUT COURT INTERVENTION**

16 After Loop AI discovered this conflict through discovery received from Orrick in August
 17 2015, Loop AI made several attempts to meet and confer with counsel for Almagiva and for
 18 Venable, in an effort to determine if alternatives to disqualification existed and could be
 19 implemented. *See* VCH Decl. at ¶¶ 4-6. Loop AI continued in its attempts to meet and confer
 20 with both Almagiva and Venable regarding this issue through September 3, 2015. Almagiva and
 21 Venable declined to engage in any discussion regarding this issue.

22 **RELIEF SOUGHT**

23 Loop AI respectfully requests the Court to order the disqualification of Attorney
 24 Sternberg and of Venable from any further participation as counsel in this case, whether by

25 _____
 26 ² Although Attorney Sternberg was a corporate partner at Orrick, in his biography at Venable he
 27 identifies himself as handling both corporate and litigation matters, and being "actively engaged
 28 in multijurisdictional disputes, including ... litigation, patent infringement, trade secret
 misappropriation, employment, and construction matters." *See* Venable website at
<https://www.venable.com/peter-r-sternberg/> (last accessed September 14, 2015).

1 formal appearance or by informal consultation with other counsel. Loop AI also requests that
2 any confidential information or advice Attorney Sternberg shared with Almayiva or with anyone
3 else regarding Loop AI or Orrick's work-product for Loop AI, including the agreements that are
4 at issue in this action, be isolated and that the persons to whom Attorney Sternberg made such
5 disclosures be prohibited from using it. Loop AI further requests entry of any other remedy that
6 the Court may deem just and proper under the circumstances.

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10 Respectfully submitted,

11 September 16, 2015

12 By: /s/ Valeria Calafiore Healy

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Loop AI Labs Inc. (“Loop AI”) respectfully submits this Memorandum of Points
3 and Authorities in support of its Motion to Disqualify Attorney Sternberg (“Sternberg”) and his
4 new firm Venable LLP (“Venable”) from any further participation as counsel for the Almagiva
5 Defendants in this litigation.³

6 **SUMMARY OF ARGUMENT⁴**

7 This Motion arises out of a peculiar set of circumstances recently discovered by Loop AI
8 — namely that the Orrick attorney responsible for taking on Orrick’s conflicted representation of
9 Almagiva against Orrick’s client Loop AI, attorney Sternberg, moved to Venable in February
10 2015 — when the wrongdoing alleged in this action was discovered — and continued his
11 conflicted representation of Almagiva against Loop AI from that new firm. While at Orrick,
12 Sternberg was the lead client partner and was in charge of supervising the Orrick team
13 performing work for Almagiva, including supervising the implementation of some of the key
14 transactions at issue in this action.⁵ Sternberg now has the same role at Venable.⁶ Although
15 Venable was able to successfully conceal Sternberg’s role at Orrick and his participation in this
16 case until early August 2015, Venable now has admitted that Sternberg has been actively
17 involved in representing Almagiva against Loop AI in this action since February 22, 2015.⁷
18 Sternberg’s personal exposure to liability resulting from the underlying conduct at issue in this

19 ³ Because the distinction between the three Almagiva entities is not material to any issue
20 presented by this Motion, the terms “Almagiva” or “Almagiva Defendants” are used generally
21 herein to refer to Defendants Almagiva S.p.A., Almagiva S.r.l., and Almagiva USA Inc..

22 ⁴ All facts recited in this motion are already in the record or are otherwise supplemented by the
23 accompanying declarations and evidence. Although certain facts are provided for context, the
24 material facts relevant to this Motion are few and undisputed — namely that (1) Orrick was Loop
25 AI’s counsel from April 2012 to March 11, 2015, (2) that during this period of time until
26 February 2015, Sternberg was an Orrick partner, (3) that during the last year of this period (i.e.,
27 beginning in March 2014), Sternberg impermissibly undertook and caused Orrick to undertake the
28 concurrent conflicted representation of Almagiva, (4) that in February 2015, Sternberg moved
his conflicted representation of Almagiva to Venable from where he began work on this case in
February 22, 2015, (5) that Sternberg has since been working on the case with the rest of the
Venable team tainting the entire firm.

⁵ See VCH Decl., Ex. I at Response to Request 12.

⁶ See *id.* at Ex. A at, e.g., Responses to Requests 1, 2, 5, 7.

⁷ As the Court may be aware, Venable vigorously objected to a Subpoena issued to Orrick
requesting the identification of the Orrick attorneys who had worked on the Almagiva-Gatti-
IQSystem matter, which both Orrick and Almagiva’s counsel refused to identify voluntarily.

1 case, as well as his residual fiduciary obligations to Loop AI raise serious irreconcilable conflicts
2 in this case requiring his and Venable's disqualification.

3 Sternberg was at the epicenter of Orrick's conflicted representation of Almaviva.
4 Indeed, he appears to have been the proximate cause of Orrick's failure to detect and properly
5 address the obvious conflict between the interests of Orrick's client Loop AI and the interests of
6 Orrick's other client, Almaviva. The client matter opened by Sternberg in connection with
7 Orrick's conflicted representation of Almaviva (coyly named "California Joint Venture")⁸
8 required conflicts clearance within Orrick, through a process beginning with the submission of a
9 conflicts clearance form.⁹ That form conveniently omitted to list Gatti. Had the form submitted
10 by Sternberg referred to Gatti, Orrick's clearance system would have identified the conflict and
11 Orrick presumably would not have accepted the engagement.¹⁰ The failure to name Gatti in the
12 conflicts clearance form is puzzling, since she was the principal counterparty in the matter and
13 actively communicated with Sternberg throughout the course of Sternberg's conflicted
14 representation of Almaviva.¹¹ Whether the omission was intentional or inadvertent, Sternberg
15 profited from it. Had he ensured proper conflicts clearance protocols were followed, he would
16 have been unable to participate in the revenues generated by Orrick in the matter (or,
17 presumably, in the revenues subsequently generated by Venable in this litigation). Because
18 Sternberg failed to take appropriate action to identify the conflict, Orrick helped Almaviva sign
19 up Gatti to a concurrent CEO position that violated the express terms of Gatti's agreements with
20 Loop AI — agreements prepared for Loop AI by Orrick. Orrick also prepared a patent
21 application for Almaviva that covers the same area of technology of Loop AI's proprietary
22 technology, and on which Gatti appears to have provided input (also in breach of Gatti's
23 agreements with Loop AI prepared by Orrick).¹²

24 ⁸ See VCH Decl., Ex. I at Response to Request 3.

25 ⁹ See *id.* at Ex. C.

26 ¹⁰ See *id.* at Ex. E (Orrick's conflicts clearance form for Loop AI listing Gatti).

27 ¹¹ See, e.g., *id.* at Ex. D (email dated April 2014 discussing Orrick's work on Almaviva-Gatti-IQS's contracts).

28 ¹² Indeed, although Almaviva repeatedly represented to the Court that Gatti had no participation in any technology pursuits by Almaviva, most recently Almaviva has asserted privilege over all communications between Orrick and Gatti involving the Almaviva patent application which is at issue in this action.

1 The adverse consequences flowing from Orrick’s conflicted representation might have
 2 been at least modestly reduced if the Orrick teams working for Al maviva and Loop AI had been
 3 separated by ethical barriers. Instead, the opposite occurred. The Orrick team of lawyers and
 4 paralegals that worked under Sternberg’s oversight on the Al maviva-Gatti-IQSystem “Joint
 5 Venture” matter overlapped with the Orrick team that worked on Orrick’s representation of Loop
 6 AI – at least three fee-earners billed time to both clients, and most of the Orrick fee earners on
 7 Sternberg’s Al maviva team were part of Orrick’s corporate group, including its tight-knit
 8 compensation and benefits subgroup, which in the United States has only 9 lawyers.¹³

9 As a partner at Orrick, Sternberg breached his ethical obligations to Orrick’s client Loop
 10 AI by taking on and participating directly in Orrick’s conflicted representation of Al maviva and
 11 continuing this representation actively over the course of almost one year.¹⁴ Had Sternberg
 12 remained a partner at Orrick, there is of course no question that neither he nor anyone else at
 13 Orrick could have undertaken to represent the Al maviva Defendants or any other party in this
 14 litigation. But in February 2015, Sternberg conveniently moved from Orrick to Venable, just a
 15 few weeks before the action was filed. Sternberg should not be permitted to continue a
 16 conflicted representation that unquestionably would be prohibited had he remained at Orrick,
 17 simply by changing firms at precisely the time the wrongdoing was detected. Even if Sternberg
 18 intends to claim that he was unaware of the serious ethical violations he committed to the
 19 detriment of Loop AI from March 2014 until Gatti’s wrongdoing was discovered in February
 20 2015, he was required at that point to take whatever actions he possibly could to address the past
 21 and continuing harm to Loop AI caused by his improper conduct. Instead, he elected to double
 22 down on the conflict, by continuing to represent Al maviva, in matters adverse to Loop AI, and to
 23 pretend that this course of conduct was perfectly acceptable because he had switched firms.
 24 Sternberg immediately got to work on this litigation on behalf of Al maviva, billing his first time
 25 entry on it on February 22, 2015 — a Sunday — and less than one business day after the
 26 Complaint was filed the evening of February 20, 2015. This was clearly improper. Neither

27 ¹³ See, e.g., VCH Decl. and GMC Decl.

28 ¹⁴ See VCH Decl., Ex. I.

1 California nor New York law permit attorneys to so quickly escape their duties to clients, and to
2 instead benefit at their expense. Under the facts of this case, including Venable's concealment of
3 Sternberg's role, equity requires that the representation of Almaviva by Sternberg and his current
4 firm, Venable, be analyzed under the standards that would apply had he remained at Orrick.
5 Those standards require his automatic disqualification.

6 Even if the Court were to examine Sternberg's conflicts as involving a successive
7 representation against a former client, Sternberg's disqualification remains mandatory because
8 neither he, nor by imputation his new firm, Venable, may represent clients with adverse interests
9 in successive representations where, as in this case, there is a "substantial relationship" between
10 the two representations. Here, crucial aspects of Orrick's representation are not only
11 substantially related, but directly at issue. Among other things, Loop AI alleges various breaches
12 of employment agreements drafted by Orrick, and Almaviva points to other virtually identical
13 agreements also implemented by Orrick, which it claims contain representations that provide it a
14 defense to certain claims. Loop AI disputes Almaviva's reliance on the representations
15 contained in the Almaviva agreements, as Orrick could never have properly advised Almaviva
16 that it could go forward with those agreements with Gatti and IQSystem, without incurring
17 liability to Loop AI. The plain allegations in the complaint, as amended, can leave no doubt that
18 there is a substantial relationship between the representations. While Sternberg was at Orrick he
19 had extensive access to Loop AI's confidential and privileged information both from within
20 Orrick, as well as directly from Loop AI, by virtue of his personal interactions with Anna Gatti,
21 who was Loop AI's CEO and President while Sternberg was dealing with her. In the course of
22 this litigation, Attorney Sternberg's colleagues at Venable already have used confidential
23 information belonging to Loop AI that they did not obtain in discovery and that they could not
24 have had but for their improper access to Loop AI's confidential information through
25 Sternberg.¹⁵

26 ¹⁵ For instance, Venable's attorney were in possession of highly confidential information
27 regarding Loop AI's investors and employees, which was not disclosed in any filing and which is
28 not publicly available. Most recently, Venable's attorneys issued a Subpoena to a Venture
Capital firm detailing facts that Venable could not have known without using the wrongfully
acquired confidential information of Loop AI.

1 As a result of Sternberg's breaches of the twin duties loyalty and confidentiality that he
2 owed Loop AI while at Orrick, and which he continued to breach from Venable by undertaking
3 to represent Almagiva against Loop AI in this litigation, the entire Venable firm is tainted by
4 Sternberg. That taint causes a presumption that Venable should also be disqualified. This
5 presumption is difficult for Venable to rebut because it has confirmed that Sternberg is the lead
6 partner on Venable's Almagiva engagement and that he has billed a substantial amount of time
7 to this litigation matter. In addition, Venable's response to a Subpoena issued by Loop AI
8 confirms that Mr. Sternberg also has been advising Almagiva about the Loop AI's agreements
9 with Gatti, which, as discussed above, were all prepared by Orrick. It is especially improper
10 under the circumstances of this case for Sternberg (and the Venable team he directs) to provide
11 legal advice to Almagiva presumably attacking Orrick's work-product for Loop AI. Sternberg
12 has a lingering duty of loyalty to Loop AI that cannot be defeated simply by his move to a
13 different firm just before the action was filed. His participation as a behind-the-scenes advocate
14 for Almagiva in this litigation is not only unseemly, but legally impermissible. These facts
15 require his and Venable's disqualification.

16 There is a third independent reason why Sternberg and Venable should be disqualified.
17 Sternberg faces personal exposure to liability arising out of his own conduct in connection with
18 the representation of Almagiva while at Orrick. For instance, if Sternberg and his Orrick team
19 advised Almagiva that it could not hire Gatti without Loop AI's consent, but Almagiva did it any
20 way, then Venable will have acted in a manner inconsistent with its duty of candor to the Court,
21 in pressing the arguments it has thus far made on behalf of Almagiva to the effect that Almagiva
22 had "no reason to believe" of any "legal" or "practical" consequences to the hiring of Gatti.
23 Conversely, if Sternberg and his Orrick team failed to advise Almagiva of the legal implications
24 that would flow from Almagiva's hiring of Gatti, Sternberg would be exposed to liability to
25 Almagiva. One of these paradigms must be true (Sternberg and his Orrick team either did, or did
26 not, advise Almagiva as to the legality of hiring Gatti without Loop AI's consent). Either way,
27 Sternberg faces a material personal conflict that makes it improper for him and Venable to have
28

undertaken Al maviva's representation in this case.¹⁶ Venable's desire to help its new partner Sternberg avoid or mitigate that exposure materially conflicts with Venable's role as an advocate in this case, creates an appearance of impropriety and is likely to impede the integrity of justice.

Finally, disqualification of Sternberg and Venable here would not be inequitable either to Al maviva or its lawyers, and instead is appropriate for two separate reasons. Venable's conflict is a continuation of the conflict caused by Sternberg when he failed to comply with Orrick's conflict clearance procedures. Partners in law firms are well aware of the importance of the conflicts clearance process, and of their ethical obligation to take reasonable and appropriate actions to identify and properly address actual or potential conflicts. Here, because Sternberg apparently couldn't be bothered to disclose to his colleagues at Orrick the name of the party his client had hired him to negotiate with (Gatti), he has needlessly damaged the interests of Loop AI. That is not conduct that deserves the benefit of the doubt. In addition, Al maviva will not be prejudiced by the disqualification of Sternberg and Venable because the case is still in its early stages, and Al maviva's fees and expenses in this litigation are being covered by Al maviva S.p.A.'s insurance.¹⁷

ARGUMENT

I. LEGAL FRAMEWORK

"In the federal system, the regulation of lawyer conduct is the province of the courts, not Congress." *Paul E. Iacono Structural Eng., Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983). "The authority of federal courts to disqualify attorneys derives from their inherent power to 'preserve the integrity of the adversary process.'" *Hempstead Video, Inc. v. Inc. Vill. Of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005).¹⁸ "In exercising this power," courts attempt to strike a balance between "a client's right freely to choose his counsel" against "the need to

¹⁶ In addition, Sternberg is a crucial witness regarding material aspects of this case over which Al maviva and Gatti have already provided differing accounts.

¹⁷ In addition, Al maviva retained Orrick with full knowledge that Orrick was already Loop AI's counsel. It would be unfair, after Al maviva caused Loop AI to lose its important relationship with Orrick, that it is instead permitted to continue to improperly benefit in this litigation from Sternberg's knowledge from his time at Orrick.

¹⁸ See also, e.g., *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996) ("Federal courts have inherent powers to manage their own proceedings and to control the conduct of those who appear before them."); *Flatworld Interactives LLC v. Apple Inc.*, No. 12-01956, 2013 U.S. Dist. LEXIS 111496, at *16 (N.D. Cal. Aug. 7, 2013).

1 maintain the highest standards of the profession.” *Id.* “The district courts are free to regulate the
 2 conduct of lawyers appearing before them.” *Humphrey*, 722 F.2d at 439. The Northern District
 3 of California directs attorneys to comply with the Standards of Professional Conduct of the State
 4 Bar of California, including “the decisions of any court applicable thereto.” *See* Civil L.R. 11-
 5 4(a)(1). “Where those rules do not provide an applicable standard, the Model Rules of
 6 Professional Conduct of the American Bar Association and the Restatement may be considered
 7 guidance.” *Dieter v. Regents of the Univ. of Calif.*, 963 F. Supp. 908, 910 (E.D. Cal. 1997). The
 8 Ninth Circuit has held that even though the Northern District of California local rules do not
 9 incorporate by reference the ABA Model Rules of Professional Conduct, a court in this district
 10 can properly disqualify counsel based on an ABA model rule, even if such rule is not included in
 11 the State Bar Act of California or the Rules of Professional Conduct of the State Bar of
 12 California. *Humphrey*, 722 F.2d at 439 (disqualifying counsel for failure to “maintain the
 13 appearance of propriety” in violation of an ABA model rule.).

14 An attorney’s participation in the representation of a party to a litigation is sufficient to
 15 render him an officer of the court, even if the attorney remains in the background and never
 16 enters a notice of appearance in the court presiding over the litigation, as Sternberg has done in
 17 this case.¹⁹ *See, e.g., Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995)
 18 (house counsel participation in the case sufficient to render him an officer of the court) (citing
 19 *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 381 (S.D. Tex. 1969)).²⁰ For instance in *E.F.*
 20 *Hutton*, the Texas district court considered whether it had power to disqualify attorneys in a New
 21 York law firm who, as Sternberg here, were participating in the litigation from behind the scenes,
 22 by “advising” and “consulting with” the attorneys in a local Texas firm who were of record in
 23 the case. The court found that its “inherent power to manage its affairs [was] broad enough to
 24 reach such conduct, which can only be intended to influence the course of litigation pending

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 26 ¹⁹ In this case, none of the Venable attorneys working on this litigation has filed the notice of
 appearance required by Local Rule 5-1(c)(2) or a motion for pro hac vice admission.

27 ²⁰ *Cord v. Smith*, 338 F.2d 516, 526 (9th Cir. 1964), *mandate clarified*, 370 F.2d 418 (9th Cir.
 28 1966) (clarifying that attorney who was not of record was disqualified from “at any time, directly
 or indirectly, and whether as attorney of record or not, represent, counsel or advise plaintiff ... in
 connection with said action.”).

1 before it.”²¹ *E.F. Hutton*, 305 F. Supp. at 378-379. The court also considered the question of
 2 whether the New York attorneys, who were neither residents of Texas nor admitted to practice
 3 before that court either generally or *pro hac vice*, could nonetheless be subject to the Court’s
 4 disqualification order. The court held that its “power over attorneys is broader than its
 5 jurisdiction over nonresidents generally, for when attorneys undertake to represent parties to
 6 pending litigation, they become officers of the court, at least in connection with that litigation.”
 7 *Id.* at 379-380. The court concluded that seeking disqualification of the New York attorneys was
 8 appropriate because their advising and consulting with the attorneys of record about the pending
 9 litigation from the background was “equivalent to the practice of law in [that court] without
 10 leave.” *Id.*

11 Similarly, in this case, although Sternberg appears to be based in New York, in response
 12 to the Subpoena,²² Venable has confirmed that his first time entry on this litigation was recorded
 13 on February 22, 2015 and his total “recorded time” to this litigation through August 17, 2015
 14 was 73 hours.²³ In light of his undisputed participation in this litigation, Sternberg is properly
 15 subject to any order this Court may issue regarding his further participation in the case.²⁴ As the
 16 *EF Hutton* court noted, “the New York attorneys’ failure to identify themselves as counsel for” a
 17 party, does not diminish that “the New York attorneys are actively representing Hutton in
 18 connection with this litigation.” *EF Hutton*, 305 F. Supp. at 382-383. The “court therefore has a
 19 great interest in supervising their conduct in connection with this litigation, as great an interest as
 20 if they had entered a formal appearance and were attending proceedings had in open court.” *Id.*
 21 In addition, this Court has power to issue orders regarding Sternberg’s participation in this case
 22 by virtue of its jurisdiction over Venable and Almagiva.

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 25 ²¹ As set forth in *Pumphrey* above, the Ninth Circuit relied on *E.F. Hutton* and similar authorities
 26 to affirm the disqualification of other counsel who was not of record with the Court.

27 ²² See, e.g., VCH Decl. at Ex. F.

28 ²³ See *id.* at Ex. A at 7.

²⁴ See also, e.g., ABA Model Rules of Professional Conduct (“Model Rules”) § 8.5(a) (“A
 lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this
 jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”).

1 Finally, because Sternberg is an attorney licensed by the State Bar of New York, in
 2 considering his disqualification this Court should also look to the New York Rules of
 3 Professional Conduct.²⁵

4 **II. STERNBERG IS NOT PERMITTED TO CONTINUE ACTING ADVERSELY TO**
 5 **LOOP AI EITHER DIRECTLY OR THROUGH VENABLE.**

6 Disqualification based on an attorney's conflicts of interests involving two clients
 7 traditionally arise in two situations: "where the attorney successively represents clients with
 8 potential or actual adverse interests [(“former client”)] and where the attorney simultaneously
 9 represents clients with potential or actual adverse interests [(“concurrent client”).” *Jessen v.*
 10 *Hartford Casualty Ins. Co.*, 111 Cal. App. 4th 698, 705 (Cal. App. 5th Dist. 2003). Courts have
 11 formulated distinct tests to apply in these two situations. *Id.* When the facts involve concurrent
 12 clients, “the rule of disqualification, in all but a few instances, ... is per se or [an] automatic
 13 one.” *Id.* at 705-706. When the facts involve a former client, the governing test looks to whether
 14 there is a “substantial relationship” between the antecedent and current representations. *Id.* As
 15 the *Jessen* court cautioned, however, “in many contexts, exacting specificity in the law is
 16 unrealistic, so the relevant legal principles are only generally stated and must be applied to
 17 individual cases by the exercise of the court’s considered judgment based in reason, logic and
 18 common sense.” *Id.* at 713. For instance, courts have not hesitated to apply the concurrent
 19 clients test where an attorney’s conduct surrounding the beginning of the challenged
 20 representation involves a past breach of fiduciary duty to the client against whom the attorney is
 21 now acting. *See, e.g., The Fund of Funds Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 232-233
 22 (2d Cir. 1977). That is because “the primary value at stake in cases of simultaneous or dual
 23 representation is the attorney’s duty—and the client’s legitimate expectation—of *loyalty*, rather
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27 ²⁵ See N.Y. Rule of Professional Conduct (“NY Rules”) § 8.5(b)(2)(i) (“If the lawyer is licensed
 28 to practice only in this state, the rules to be applied shall be the rules of this state.”); ABA Model
 Rules 8.5(b)(2). *See also* VCH Decl. Ex. F.

1 than confidentiality.” *Flatt v. Superior Court*, 9 Cal. 4th 275, 282 (1994). Attorneys are not
 2 allowed to escape this important duty on technicalities, such as by turning a current client into a
 3 former one.

4 The circumstances of this case are such as to require that Sternberg’s conflicts be
 5 evaluated under the “current client” test. As more fully discussed below, while he was at Orrick,
 6 Sternberg owed (and breached) his fiduciary duty of loyalty to Loop AI. Had Orrick and
 7 Sternberg promptly disclosed the conflict to Loop AI while Sternberg was still at Orrick, there is
 8 no question that his disqualification would have been immediate and automatic. Instead,
 9 Sternberg conveniently moved his conflicted representation from Orrick to Venable in February
 10 2015, right before the action was commenced, and while Orrick remained counsel for Almaviva
 11 with Sternberg through at least March 11, 2015.²⁶ Sternberg was instrumental in having
 12 Almaviva retain Venable,²⁷ knowing of Orrick’s conflicts but without disclosure of such
 13 conflicts to Loop AI.²⁸ In addition, Sternberg and his new team at Venable continued to conceal
 14 Sternberg’s role both while he was at Orrick and after he moved to Venable and even
 15 aggressively objected to Orrick’s disclosure, in response to a subpoena, of the identity of the
 16 attorneys who had worked on the Almaviva matter. Sternberg’s role was only discovered as a
 17 result of the Court’s order during a status conference held on July 23, 2015, that the Orrick
 18 Subpoena be responded to and the Court’s questioning the assertion of privilege over the identity
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 21 ²⁶ During this period of time, Orrick continued as Loop AI’s counsel until its sudden withdrawal
 22 on March 11, 2015. *See* Dkt. No. 29-1. When Orrick first informed Loop AI of its conflict and
 23 of its withdrawal from Loop AI’s representation, Orrick claimed that it was also withdrawing
 24 from the representation of Almaviva. However, Both Venable and Orrick have refused to
 25 produce the alleged letter of termination by Orrick to Almaviva. As of today’s date, Orrick
 26 continues to be listed as counsel of record for Defendant Almawave S.r.l. before the United
 27 States Patent Office in connection with the Almaviva/Sandei patent application that is at issue in
 28 this action. *See* VCH Decl. at Ex. B. Venable also indicated in response to a Subpoena to be
 working on the Almaviva/Sandei patent application that is at issue in this action. *See* VCH Decl.
 Ex. A at 8. In light of this evidence, it appears that Sternberg and Orrick continue to be co-
 counsel for Almawave S.r.l. on at least the patent matter.

²⁷ *See* VCH Decl. at Ex. A (Response to Request 1).

²⁸ In light of Sternberg’s conduct to date, it would not be surprising if he has also failed to
 disclose his conflicts to Almaviva before signing them up with Venable in connection with this
 litigation.

1 of the Orrick attorneys who had worked on the Almayiva matter.²⁹ Under these facts, applying
 2 the “current client” analysis is appropriate. To hold otherwise would be to allow an attorney as
 3 deeply conflicted as Sternberg to escape the consequences of his multiple breaches of duty by the
 4 simple expedient of a timely change of firms, and to allow him to benefit from litigation over
 5 wrongdoing that he facilitated. As the California Supreme Court has observed, “[u]ltimately,
 6 disqualification motions involve a conflict between the clients’ right to counsel of their choice
 7 and the need to maintain ethical standards of professional responsibility.” *People ex. rel. Dept.*
 8 *of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4th 1135, 1145 (Cal. 1999). “The
 9 paramount concern must be to preserve public trust in the scrupulous administration of justice
 10 and the integrity of the bar. The important right to counsel of one’s choice must yield to ethical
 11 considerations that affect the fundamental principles of our judicial process.” *Id.*

12 In any event, as more fully set forth below, Sternberg’s disqualification, and by
 13 imputation that of Venable, is also required under the “former client” test.

14
 15 **A. Sternberg’s Conflicted Representation of Almayiva Was in Breach of His Duty of**
 16 **Loyalty to Loop AI And Cannot Be Cured By His Move to Venable Right Before this**
 17 **Action Was Filed.**

18 During the time that Sternberg was at Orrick, until February 2015, Orrick served as Loop
 19 AI’s principal counsel, having began in that role in April 2012.³⁰ See GMC Decl. at ¶ 4. As a
 20 partner at Orrick, Sternberg owed Orrick’s client Loop AI a fiduciary duty of undivided loyalty.
 21 *Flatt*, 9 Cal. 4th at 286, 288³¹ (adopting same rule as *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d

22
 23 ²⁹ See VCH Decl. at ¶¶ 19-20.

24 ³⁰ Sternberg is believed to have moved from Orrick to Venable sometime in February 2015.
 25 Loop AI does not know whether Sternberg continued to receive partner distributions or other
 26 payments from Orrick after he moved to Venable, or whether he continues to have any direct or
 27 indirect role or participation in the Orrick partnership. Loop AI notes, however, that as *of*
 28 **September 16, 2015**, Sternberg continues to be listed with the New York State Bar as being
 affiliated with Orrick. See VCH Decl., Ex. B.

³¹ Also noting that “cases of dual representations involving unrelated matters--analogous to the
 biblical injunction against ‘serving two masters’ (Matthew 6:24)--is such a self-evident one that
 there are few published appellate decisions elaborating on it.”

1 1384 (2d Cir. 1976)); *Speedee Oil*, 20 Cal. 4th at 1146; *Flatworld Interactives LLC v. Apple*
 2 *Inc.*, No. 12-01956, 2013 U.S. Dist. LEXIS 111496, at *21 (N.D. Cal. Aug. 7, 2013).³² “So
 3 inviolate is the duty of loyalty to an existing client that not even by withdrawing from the
 4 relationship can an attorney evade it.” *Id.* at 288. The duty of loyalty bars a lawyer from acting
 5 contrary to the interest of another current client on any matter, regardless of whether there is a
 6 relationship between the matters or any sharing of confidences.³³

7 In *Flatworld*, for instance, the court examined a conflict involving the law firm of
 8 Morgan Lewis & Bockius LLP (“Morgan Lewis”) to determine a disqualification motion
 9 involving a third firm, Hagens Berman, that a partner at Morgan Lewis had assisted in finding.³⁴
 10 Specifically, a partner in the Philadelphia office of Morgan Lewis, without doing a conflict
 11 check, began providing informal legal advice to his wife who was an officer in a company –
 12 Flatworld – that was planning to sue Apple Inc. (“Apple”). *See id.* at *5-6. At the time, Apple
 13 was a client of Morgan Lewis, albeit using attorneys from Morgan Lewis’ Palo Alto, San
 14 Francisco and Washington, D.C. offices. *Id.* at *5. The Morgan Lewis partner in question had
 15 never personally worked on any Apple matter nor had he had any contact with any Apple
 16 representatives. *Id.* There was also “no evidence before the Court that [the partner in question]

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 19 ³² *See also, e.g.*, ABA Model Rules of Prof’l Conduct R. 1.10 (2014-2015); N.Y. Rules of Prof’l
 20 Conduct R. 1.10 (2013-2015); *The Fund of Funds Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225
 21 (2d Cir. 1977); *William H. Raley Co. v. Superior Court*, 149 Cal. App. 3d 1042, 1048 (Cal. App.
 22 4th Dist. 1983).

23 ³³ *See, e.g.*, ABA Model Rules of Prof’l Conduct R. 1.7 (2014-2015); N.Y. Rules of Prof’l
 24 Conduct R. 1.7 (2013-2015); Cal. Rules of Prof’l Conduct R. 3-310. *See also, e.g., Flatt v.*
 25 *Super. Ct.*, 9 Cal. 4th 275, 284-286 (1994) (also citing identical bar under New York law).
 Further, as *Flatt* explains it does not “matter that the intention and motives of the attorney are
 honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent
 conduct, but as well to preclude the honest practitioner from putting himself in a position where
 he may be required to choose between conflicting duties, or be led to attempt to reconcile
 interests, rather than to enforce to their full extent the right of the interest which he should
 represent.” *Id.* at 289.

26 ³⁴ As set forth below, unlike Sternberg in this case, the Morgan Lewis partner who created the
 27 conflict in *Flatworld* did not have any involvement in any aspect of the litigation before the
 28 Court and **did not continue his conflicted representation** either from Morgan Lewis or from the
 firm, McCarter & English LLP, to which he moved while the motion was pending. In addition,
 the law firm that Apple’s sought to disqualify, Hagens Berman, **was not affiliated with and had**
not had any contacts with the Morgan Lewis partner in question.

1 personally obtained or even tried to access any material confidential information about Apple
2 while with Morgan Lewis.” *Id.* The court held that

3 Just as a Morgan Lewis attorney working on Apple matters could not act
4 adversely against Apple, so too was [the partner in question] barred from doing
5 so, whether in a legal capacity or not. He owed a duty of loyalty to his firm’s
6 client, and ‘it is a violation of that duty for him to assume a position adverse or
7 antagonistic to that client without the latter’s free and intelligent consent.’

8 *Id.* at *21. As in *Flatworld*, so here, Sternberg was not permitted to act adversely to Loop AI, an
9 Orrick client, “whether in a legal capacity or not.” Despite his fiduciary obligations to Loop AI,
10 in March 2014, Sternberg nonetheless agreed to take on the representation of Al maviva in
11 connection with its dealings with Anna Gatti and her companies, the IQSystem Defendants —
12 which representation was not only contrary to the interest of Orrick’s pre-existing client, Loop
13 AI, but directly adverse and materially damaging to it. When Sternberg agreed to undertake this
14 conflicted representation of Al maviva, Anna Gatti, was Loop AI’s CEO, and she was bound by
15 employment and confidentiality agreements prepared by Orrick. During this time, Gatti was
16 dealing with Orrick on behalf of Loop AI. *See* GMC Decl. at ¶ 4. Presumably in an effort to
17 avoid Orrick’s detection of this material conflict, on March 27, 2014, Sternberg caused a conflict
18 clearance form to be submitted to Orrick which omitted to list Gatti, and omitted to list the
19 names of the sole member of the IQSystem Defendants — also Anna Gatti — which was readily
20 available from the California Secretary of State, and which Sternberg was required to examine to
21 properly clear conflicts.³⁵ *See* VCH Decl. Ex. C. Sternberg’s failure to list Gatti, both in March
22 2014 when he agreed to represent Al maviva and later, when he was directly preparing
23 agreements involving Anna Gatti and personally dealing with her, is not reasonably justifiable as
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25 ³⁵ It should also be noted that Al maviva’s retention of Loop AI’s counsel was not coincidental.
26 In addition to soliciting Loop AI’s counsel, Al maviva solicited each of Loop AI’s crucial
27 relationship with its service providers, such as its accountant, its advisors, its consultants, and
28 even its payroll provider and its bank. Moreover, in an email dated April 5, 2014, Gatti informed
the recruiting firm Russell Reynolds that Al maviva was now working with the same firm she
used. *See* VCH Decl., Ex. D at RRA223. It seems highly unlikely that Al maviva or Gatti would
not discuss with Sternberg that Orrick was already counsel to Loop AI.

1 Anna Gatti was the primary counterparty in all of the Al maviva transactions.³⁶ Had Sternberg
 2 included Gatti's name as he was required to do, Orrick's conflicts clearance system would have
 3 readily detected the conflict because Gatti was listed in the conflict clearance form previously
 4 submitted for Loop AI in 2012 (then named Soshoma). *See* VCH Decl. at Ex. E. In addition,
 5 Gatti, was regularly in contact with Orrick on behalf of Loop AI, and was specifically in contact
 6 with Orrick in March and April 2014 to address various employment related and other matters
 7 for Loop AI.

8
 9 Despite the material conflicts that barred Sternberg from undertaking and authorizing
 10 Orrick's undertaking of the Al maviva representation involving Gatti and the IQSystem
 11 Defendants, on April 4, 2014, Sternberg caused Orrick to nonetheless begin the conflicted
 12 representation. From that date and until his departure from Orrick in February 2015, Sternberg
 13 was the Orrick attorney responsible for supervising all aspects of Orrick's representation of
 14 Al maviva in connection with the matters at issue in this action. *See* VCH Decl, Ex. I. For
 15 instance, on April 17, 2014, Al maviva's CEO, Valeria Sandei, emailed Anna Gatti to advise her
 16 that "Orrick [sic] is also working on your contract, along the lines shared with Pepe. That
 17 contract can also be executed by AW USA once it is formed." VCH Decl., Ex. D at RRA221.
 18 The contract referenced by Ms. Sandei, which was ultimately signed by Gatti and Al maviva in
 19 June 2014 was directly in violation of Gatti's pre-existing obligations under another contract also
 20 prepared by Orrick. The entirety of Sternberg and his Orrick team's representation of Al maviva
 21 in connection with Gatti and IQSystem was contrary to the interests of Loop AI and should never
 22 have been undertaken let alone continued for almost one year, without any disclosure to Loop
 23 AI. By this conduct, Sternberg breached the most "fundamental value of our legal system ... the
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 27 ³⁶ *See, e.g., State Farm*, 72 Cal. App. 4th at 1435 ("it is the attorney who is charged with the
 28 responsibility of performing conflict checks upon accepting a new client.[.] Thus, the burden was
 on [the attorney] to avoid creating a conflict.").

attorney's obligation of loyalty." *Speedee Oil*, 20 Cal. 4th at 1146.³⁷ There is no question that while Sternberg was still at Orrick, his disqualification would have been automatic. *Id.* at 1147.³⁸ Sternberg's move to Venable in February 2015 did not and could not "remove the taint of a[n eleven]-month concurrent representation. Consequently, the mandatory disqualification rule applies." *State Farm Mut. Auto Ins. Co. v. Fed. Ins. Co.*, 72 Cal. App. 4th 1422, 1432-1433 (Cal. App. 5th Dist. 1999). Application of this rule here is required to vindicate and preserve Loop AI's legitimate expectation of loyalty from all of its attorneys at Orrick. *See also, e.g., The Fund of Funds Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 232-233 (2d Cir. 1977).³⁹ Sternberg's move to Venable could not eliminate this direct conflict and the appearance of impropriety that followed from his continuing the conflicted representation from a different firm. Courts are vigilant in strictly addressing exactly this kinds of conflicts.

For instance, in *Fund of Funds*, the law firm Morgan Lewis & Bockius LLP ("Morgan Lewis") was retained to represent an accounting firm, Arthur Andersen & Co. ("Andersen"). *Id.* at 227-228. During the course of its representation of Andersen, Morgan Lewis was separately retained by representatives of The Fund of Funds ("Fund") in connection with the examination of fraudulent transactions regarding natural resource assets. *Id.* After discovering its conflict, Morgan Lewis referred the representation of the Fund to another attorney outside of Morgan Lewis (Meister) in connection with a suit that the Fund sought to bring against Andersen. *Id.* at

³⁷ As the California Supreme Court explained in *Speedee Oil*, "[a]ttorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process." 20 Cal. 4th at 1146. "The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel." *Id.* "The courts will protect client's legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship." *Id.*

³⁸ "If an attorney—or more likely a law firm—simultaneously represents clients who have conflicting interests" "disqualification follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other." *Id.* *See also, e.g., Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 967-968 (9th Cir. 2009) ("Simultaneous representation of clients with conflicting interests ... is an automatic violation in California and grounds for disqualification.").

³⁹ *See also, e.g., Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981) (citing *Fund of Funds* with approval).

232. The Court held that Meister and his firm must be disqualified because Morgan Lewis was “instrumental ... in having Meister [the new attorney] selected as the Fund’s attorney,” Meister was tainted and had to be disqualified. *Id.* Permitting Meister’s firm to pursue the litigation, the court held, “would be allowing Morgan Lewis to violate by indirection those very strictures it [could] not directly contravene.” *Id.* at 233. The need “to safeguard against the indirect breach of ‘the lawyer’s duty of absolute fidelity.’” *Id.* at 234. The court concluded that “[t]he truism that the firm of Morgan Lewis would have been disqualified from suing Andersen because it was Andersen’s counsel, is of little comfort to Andersen which now finds itself embroiled in litigation resulting from Morgan Lewis’s extensive investigation of the natural resource assets scheme.” *Id.* “And Robert Meister is the extension of Morgan Lewis’s continuing involvement in the underlying action for, as we have earlier stated, Morgan Lewis was instrumental in the choice of Meister and his firm ... and helpful to Meister in advancing the suit even if, as claimed by Meister, that help was of small significance.” *Id.*

The facts of this case present a must stronger and more egregious conflict of interest than the conflict that the Second Circuit found impermissible in the *Fund of Funds* case. Here Sternberg is not only an indirect, but the actual extension of Orrick. He is the one who personally caused and continued Al maviva’s conflicted representation while at Orrick, and then in February 2015, after he left Orrick, he moved his conflicted representation of Al maviva to the Venable firm. When this action was filed, Sternberg was, as in the *Fund of Funds* case, instrumental in getting Venable retained, and in moving his conflicted representation of Al maviva to his new firm. *See* VCH Decl, Ex. A at Response to Request 1. In addition, in this case, Sternberg himself moved to the second firm and personally continued the conflicted representation. This conduct cannot be reconciled with any of the duties he owed Loop AI and cannot cure his taint. *See supra, State Farm*, 72 Cal. App. 4th at 1432-1433. The conflicted representation that Sternberg carried on for Al maviva while at Orrick substantially facilitated the

wrongdoing at issue in this action. But for Sternberg's failure to advise Loop AI of the conflict, Loop AI would have promptly learned of Defendant Gatti's unfaithful conduct. To add insult to injury, Sternberg has now been using and sharing with Venable his knowledge from while he was at Orrick to attack Loop AI, including the contracts prepared for Loop AI by Orrick, and to interpose the contracts he prepared for Almaxiva during the course of his conflicted representation at Orrick as a defense to this action, all the while extracting maximum financial benefit for himself, through his participation as counsel in this action. Respectfully, neither Sternberg nor Venable should be permitted to take advantage of Sternberg's prior breaches to Loop AI in this manner and they should both be disqualified from any further participation as counsel of any sort in this action.⁴⁰

B. Sternberg and Venable Should Be Disqualified Even if The Court Evaluates The Conflicts Under the "Substantial Relationship" Test.

Even if the court were to examine disqualification under the former client test, Sternberg's disqualification (and by imputation that of Venable) should still be required under the facts of this case. Both California and New York law prohibit attorneys from undertaking a representation adverse to a former client without informed written consent where "by reason of the representation of the ... former client the member has obtained confidential information material to" his representation of the current client.⁴¹ To avoid inquiries into what confidential information was revealed during the course of the attorney-client relationship, courts have adopted a rule that *conclusively presumes* that an attorney received confidential information from a former client if the "former representation is substantially related to the current representation." *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980). *Jessen v. Hartford Cas. Ins.*

⁴⁰ See also, e.g., *Packard Bell NEC, Inc. v. Aztech Sys.*, No. 98-7395, 2001 U.S. Dist. LEXIS 11194, at *24-25 (C.D. Cal. Jan. 22 2001) ("The Court is mindful that it 'must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court.'").

⁴¹ See Cal. Rules of Prof'l Conduct R. 3-310(E); N.Y. Rules of Prof'l Conduct R. 1.9. See also ABA Model Rules of Prof'l Conduct R. 1.9.

Co., 111 Cal. App. 4th 698, 713 (2003).⁴² When the “substantial relationship” test is met disqualification is “mandatory.” The “conclusive presumption” that applies under this test, “avoids the ironic result of disclosing the former client’s confidences and secrets through an inquiry into the actual state of the lawyer’s knowledge and it makes clear the legal profession’s intent to preserve the public’s trust over its own self-interest.” *Id.* at 706. “Successive representations will be ‘substantially related’ when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.” *Id.* at 713. As examples of substantially related matters, the *Jessen* courts cited cases involving “information received by the attorney from a third party which will be, or may appear to the person or entity from whom the information was acquired to be, useful in the attorney’s representation in an action on behalf of the client.” *Id.* (quoting *William H. Raley Co. v. Superior Court*, 149 Cal. App. 3d 1042, 1048 (Cal. App. 4th Dist. 1983)). As well as cases involving unfair competition and related torts claims arising out of employment agreements prepared during an earlier representation. *Id.* (citing *Kaselaan & D’Angelo Assoc., Inc. v. D’Angelo*, 144 F.R.D. 235, 245-246 (D.N.J. 1992)).

In this case, there is no question that the subject matter of Sternberg and Orrick’s prior representation is substantially related to this litigation. Indeed, Sternberg’s and Orrick’s prior representation and their work product for both Al maviva and Loop AI is specifically at issue in this action. For instance, Loop AI alleges that the Defendants induced the breach of Gatti’s

⁴² “This standard, with its conclusive presumption of knowledge of confidential information, is ‘justified as a rule of necessity’ because ‘it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to ‘engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.’” *Jessen*, 111 Cal. App. 4th at 706.

1 employment agreements with Loop AI all of which were prepared by Orrick. In addition, during
 2 the course of his conflicted representation of Loop AI, Sternberg had access to Loop AI's
 3 confidential information in three material ways: (1) he was part of the same corporate group that
 4 included virtually all of the Orrick attorneys and staff that worked on the Loop AI matter, (2) he
 5 used at least three Orrick attorneys who also did work on the Loop AI matter,⁴³ (3) he had
 6 continuous unfettered access and dealings with Anna Gatti, who was Loop AI's CEO and
 7 President, and who was in possession of all of Loop AI's confidential and attorney-client
 8 privileged information. Thus, even though Sternberg never personally billed time to the
 9 Orrick/Loop AI matter, his unfettered access and communications with Loop AI's CEO are
 10 equivalent to a personal direct relationship with Loop AI, and to his direct access to all of the
 11 highly confidential information in possession of Anna Gatti which are at issue in this matter.
 12

13 Indeed, in this case, Sternberg and his Venable team have already used against Loop AI
 14 in this litigation highly confidential information of Loop AI which they were not given by Loop
 15 AI in discovery.⁴⁴ Almagiva's counsel has already displayed (and used against Loop AI)
 16 knowledge of highly-confidential information of Loop AI that were never provided to Almagiva
 17 through discovery.⁴⁵ For instance, Almagiva issued a Subpoena to an investment fund
 18 extensively detailing factual questions that Almagiva could not have known to ask without
 19 access to Loop AI's highly confidential information.⁴⁶ On other occasion, Venable disclosed
 20 knowledge of other highly confidential aspects of Loop AI's business that were not provided
 21
 22
 23
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26 ⁴³ Loop AI respectfully notes that Orrick did not always bill all the time that its attorneys spent
 27 working on a matter. Therefore, it is not possible to know precisely how many Orrick attorneys
 28 and staff members overlapped between the Loop AI and Almagiva matters.

⁴⁴ See, e.g, GMC Decl. at ¶¶ 6-7; VCH Decl. at ¶ 19.

⁴⁵ *Id.*

⁴⁶ See, e.g, GMC Decl. at ¶ 7.

1 through discovery.⁴⁷ It would be grossly unjust to let Sternberg and his new team at Venable to
 2 continue to benefit from his serious breaches to Loop AI.⁴⁸

3 In light of these facts, Sternberg had a sufficiently direct relationship with Loop AI while
 4 he was at Orrick to require this court to apply a conclusive presumption that he received
 5 confidential information relating to Loop AI.⁴⁹ Accordingly, his disqualification from this
 6 “substantially related” case is mandatory.⁵⁰

8 ⁴⁷ VCH Decl. at ¶ 19.

9 ⁴⁸ See also, e.g., *Davis v. EMI Grp., Ltd.*, No. 12-1602, 2013 U.S. Dist. LEXIS 1642, at *3-4
 10 (N.D. Cal. Jan. 4, 2013) (“a ‘paramount concern’ that the Court is charged with preserving
 11 ‘public trust both in the scrupulous administration of judge and in the integrity of the bar.’”).

12 ⁴⁹ The same prohibition extends to attorneys in a firm, even if, while in that firm, they never had
 13 any direct contact with information relating to the former client in question. See N.Y. Rules of
 14 Prof’l Conduct R. 1.9(b)-(c); *Adams v. Aerojet-General Corp.*, 86 Cal. App. 4th 1324, 1340 (Cal.
 15 App. 3d Dist. 2001). Where an attorney has no direct interaction with any representative of a
 16 former client, courts apply a “modified” substantial relationship test to determine whether an
 17 attorney “was exposed to client secrets during the time his former firm rendered services.” See
 18 *id.* at 1332-1333, 1337-1338. The distinguishing feature of this test lies in the fact that the
 19 presumption that confidences were imparted to the attorney is not conclusive, but can be rebutted
 20 by the attorney. *Id.* at 1340 (courts consider whether “confidential information material to the
 21 current representation would normally have been imparted to the attorney during his tenure at the
 22 old firm.”). Loop AI respectfully submits that in light of (1) Sternberg’s direct interaction with
 23 Gatti over the course of one year while he was at Orrick, and while she was a Loop AI officer, as
 24 well (2) Sternberg’s role in using for Almagiva at least three of the same Orrick attorneys that
 25 worked on the Loop AI matter, and (3) Sternberg’s membership in the same corporate group that
 26 included all the other Orrick attorneys working on the Loop AI matter, the standard substantial
 27 relationship test should be applied here. But even if the Court were to examine Sternberg’s
 28 conflicts under the modified substantial relationship test, his disqualification would still be
 required for the same reasons already discussed above. There can be no reasonable dispute here
 that “confidential information” relevant to this litigation would have been imparted to Sternberg
 while he was at Orrick, and following his departure from Orrick, while he continued to work
 alongside Orrick and Gatti in respect of the matters at issue in this action. Both before and after
 he left Orrick, Sternberg was dealing with Gatti and addressing her employment obligations in
 connection with his representation of Almagiva. In addition, he was also dealing with Gatti in
 connection with Almagiva’s application for a patent, which Loop AI alleges was in the same
 field of technology as that of Loop AI. Attorney Sternberg simply is in no position to self-
 proclaim that whatever information he received from Gatti belongs to Almagiva, as Venable has
 claimed to date in its opposition to the Orrick subpoena. Indeed, whether Gatti shared Loop AI’s
 information with Almagiva is critically at issue in this action.

⁵⁰ See also, cf., *Packard Bell NEC, Inc. v. Aztech Sys.*, No. 98-7395, 2001 U.S. Dist. LEXIS
 11194, at *24-25 (C.D. Cal. Jan. 22, 2001) (involving information learned from senior executive
 of party) (“Disqualification is proper where, as a result of a prior representation or through
 improper means, there is a reasonable probability counsel obtained information the court
 believes would likely be used advantageously against an adverse party during the course of the
 litigation. Though such information cannot be unlearned, and the lawyer who obtained it cannot
 be prevented from giving it to others, disqualification still serves the useful purpose of
 eliminating from the case the attorney who could most effectively exploit the unfair advantage.”)

Venable's disqualification is also required as a result of the taint brought by Sternberg. *See, e.g., Paul E. Iacono Structural Eng., Inc. v. Humphrey*, 722 F.2d 435, 441-442 (9th Cir. 1983). Venable admits that Sternberg brought the Almaviva matter to Venable, that he personally began working on this litigation for Almaviva on February 22, 2015, and that since that date he has continued to do substantial work on this litigation with the rest of his Venable team. Accordingly, Venable's disqualification is mandatory. *See id.*

III. STERNBERG'S PERSONAL INVOLVEMENT IN THE FACTS UNDERLYING THIS CASE PROVIDE AN INDEPENDENT BASIS FOR HIS AND VENABLE'S DISQUALIFICATION.

There is another independent reason why Sternberg and Venable should be disqualified from any further participation as advocates in this case. Venable is conflicted in its representation of the Almaviva Defendants in this case because Sternberg faces exposure to multi-party liabilities arising out of his representation of Almaviva while at Orrick. Venable's desire to help its new partner Sternberg avoid or mitigate that exposure conflicts with Venable's obligation to represent the Almaviva Defendants in this case and to not impact the integrity of the judicial process. The basis for Sternberg's exposure in this case is at least two fold. First, Sternberg faces personal exposure to Loop AI for his own breaches of fiduciary duty and other violations while he was an Orrick partner, including, but not limited to, as a result of his providing substantial assistance and facilitating the breaches and violations of the other Defendants. Second, Sternberg faces exposure also in respect of the advice he gave Almaviva regarding the transactions that are at issue in this action. The Orrick team, headed by Sternberg, that advised Almaviva on its hiring of Gatti doubtless had a sophisticated understanding of the issues to be addressed when hiring a technology company CEO to a part-time position. That Orrick team would have understood that what the new part-time CEO was going to do with the rest of her time could have important consequences for their client Almaviva. Gatti might have conflicting time commitments that would have to be managed (for example, if two different employers wanted her in different cities on the same day). Gatti might have access to confidential information belonging to her other employer that could be imputed to Almaviva and could expose Almaviva to claims for misappropriation of that information. Gatti might be

1 exposed to corporate opportunities that potentially could benefit both employers. And so on.
 2 The obvious way to address these issues would have been for Al maviva to insist that Gatti could
 3 be subject to competing obligations only after they were vetted by Al maviva and some
 4 agreement was reached between Al maviva and the other employer as to how the conflicts should
 5 be managed.⁵¹ If Al maviva had done this, starting with Loop AI, it would have discovered that
 6 its proposed course of conduct was unlawful. The Orrick team either did, or did not, advise
 7 Al maviva of these issues, and either did, or did not, recommend that Al maviva approach Loop
 8 AI to work the issues out before hiring Gatti. If Orrick did not give this advice and Al maviva is
 9 found liable in this litigation, Sternberg (and Orrick) face potential malpractice exposure to
 10 Al maviva. If Orrick did give this advice, and Al maviva chose to ignore it, Sternberg still may
 11 face malpractice liability, for failing to do more to protect his client from the clearly foolhardy
 12 course of action it sought to pursue notwithstanding Orrick's advice.⁵² Either way, Venable
 13 should not be in the middle of this, because this fact pattern subjects Venable to conflicts that
 14 would not be present if a wholly independent firm were advising Al maviva. These conflicts are
 15 likely to cause Venable to recommend different approaches to litigation strategy and to any
 16 settlement discussions that may occur than would be recommended by a law firm that is entirely
 17 free of conflict. Thus, Venable's conflicted representation of the Al maviva Defendants is likely
 18 to impede the efficient administration of justice and this conflict represents a separate ground on
 19 which Venable should be disqualified.

20 This aspect of the case is strikingly similar to that described by a district court granting a
 21 motion to disqualify in *Eurocom, S.A. v. Mahoney, Cohen & Co.*, 522 F. Supp. 1179, 1180

23 ⁵¹ See, for example, Twitter's employment agreement with Jack Dorsey, containing the
 24 following provision relating to his simultaneous employment by another company, Square:
 25 "While you render services to the Company, you will not engage in any other employment,
 26 consulting, or other business activity that would create a conflict of interest with the Company,
 27 which includes engaging in any work that is competitive in nature. ***To that end, prior to your***
 28 ***start date on July 1, 2015, we will develop and agree on a Conflict of Interest Policy as it***
 29 ***pertains to your work with Square, Inc.***" (emphasis supplied). filed with the SEC at
<https://www.sec.gov/Archives/edgar/data/1418091/000119312515220557/d941786dex101.htm>

⁵² If this second possible course of events is the one that occurred, some of the sworn testimony
 submitted in this case by Al maviva (professing ignorance of any possible illegality in hiring
 Gatti) will be proven at least disingenuous.

(S.D.N.Y. 1981). *Eurocom* involved a request to disqualify the law firm Cleary, Gottlieb, Steen & Hamilton LLP (“Cleary”) on the grounds that the firm was counsel had been counsel to one of litigants in the underlying transaction that was now at issue in the litigation. The court held that “[t]he actions which Cleary, Gottlieb took or failed to take in connection with the underlying transaction will obviously be explored by defendant at trial.” *Id.* at 1180. The court then concluded, that ‘whether or not, strictly speaking, the witness rule applies,’ “[a] potential conflict arises between Cleary, Gottlieb and its own client.” *Id.* at 1181. Because it could “face a malpractice action, brought by its own client” Cleary, Gottlieb

has its own interest in minimizing its role during the underlying commercial transaction, and maximizing that of the plaintiff’s own representatives, so that any factors tending to reduce plaintiff’s recovery would not be laid at the door of Cleary, Gottlieb. Secondly, the theory defendant asserts against Cleary, Gottlieb constitutes an inevitable complicating factor in settlement discussions. The possibility of settlement is always encouraged by the Court; but the parties are entitled to advice on that subject from counsel who are entirely uninhibited by any personal involvement of their own in the merits. Of course, I intimate no view with respect to the merits of defendant’s allegations against the Cleary, Gottlieb firm. That remains a matter for discovery and trial. But I do conclude that, in these circumstances, Cleary, Gottlieb must be disqualified as trial counsel.

*Id.*⁵³ Similarly, in this case, Loop AI has made claims against Almagiva and the other defendants which are based in part on Orrick’s breaches and violations, resulting from Sternberg’s undertaking of the Almagiva conflicted representation while he was at Orrick. There

⁵³ *Eurocom* is not unique in its holding. Numerous courts have held that a disqualifying appearance of impropriety is created when a counsel who is acting as advocate in a litigation was personally involved in the underlying transactions at issue in the litigation. *See, e.g., Cord v. Smith*, 338 F.2d 516, 525 (9th Cir. 1964) (“It may be that an attorney will be the only person whose knowledge, disclosed upon the witness stand, can give the court the information that it must have if it is to decide a particular case correctly. Like all privileges, the attorney-client privilege may, in a particular case, be a clog upon the proper administration of justice.”); *US v. Napoli*, No. 10-642, 2011 U.S. Dist. LEXIS 37226, at *25-26 (N.D. Cal. Apr. 5, 2011) (disqualifying counsel involved in underlying transaction from acting as trial counsel or even in an “advisory capacity.”) (“At the very least, [attorney’s] reputation is on the line because he has asserted that the ... business model described above is lawful. He has a vested interest in Defendant Napoli being vindicated, but that interest is in large part a selfish one. His previous stated positions and advice to Defendant Napoli and others calls into question his ability to fairly evaluate settlement offers in which Defendant Napoli would have to admit guilt and/or potentially implicate [attorney].”); *Woods v. Superior Court*, 149 Cal. App. 3d 931, 936 (Cal. App. 5th Dist. 1983) (“disqualification is proper here to avoid any appearance of impropriety.”); *Holm v. City of Barstow*, No. 08-420, 2008 U.S. Dist. LEXIS 110391 (C.D. Cal. Sept. 16, 2008) (In “the Ninth Circuit” the “appearance of professional impropriety ... is an independent basis for disqualification.”).

1 is no question that, under the circumstances, Sternberg and his new firm, Venable, have a
 2 personal conflict arising out of their interest in using the litigation to minimize Sternberg's own
 3 exposure. The repercussions of this conflict have already been apparent throughout the course of
 4 the litigation. Among other things, and presumably to avoid exposing Sternberg's own liability
 5 to its client, Venable has vigorously opposed not only Al maviva's participation in a preliminary
 6 mediation conference, but any involvement in such mediation by any representative of Al maviva
 7 (both of which are generally mandatory in most federal proceedings).⁵⁴

8
 9 Finally, Sternberg's unique knowledge of certain key facts make his and Venable's role
 10 as advocates in this case highly improper. For instance, the evidence shows that Sternberg
 11 assisted Al maviva and Gatti in implementing agreements with Gatti and the IQSystem
 12 Defendants (which Gatti owns) that were designed to conceal the payment of illegal bribes. *See,*
 13 *e.g.,* VCH Decl. at Ex. D. Gatti openly discussed with Al maviva's representative, Valeria
 14 Sandei, the need to have Orrick implement further modifications to the "Orrick [sic] proposal" for
 15 the IQSystem Defendant's contract, including increase in funding from \$40,000 per month to
 16 \$70,000 per month for, among other things, "gifts" to "top US clients" and "government
 17 entities," and that such payments be made as a "flat monthly retainer" because "*it is better to*
 18 *keep a series of line items and consultants off the books of Al mawave US.*" VCH Decl., Ex. D
 19 at RRA119-220 (emphasis added). As the attorney in charge of Orrick's relationship with
 20 Al mawave S.r.l., Sternberg's knowledge of, and testimony in regards to this matter will be
 21 highly material in this case.

22
 23 For the foregoing reasons, Loop AI respectfully submits that Sternberg and Venable's
 24 disqualification can be ordered here for this independent reason.
 25
 26
 27

28 ⁵⁴ This leads to the strong implication that neither Sternberg nor others at Venable ever disclosed to Al maviva the personal conflict they faced.

CONCLUSION

Loop AI respectfully requests that the Court order the disqualification of Sternberg and Venable from any further participation as counsel in this case, whether formally or informally. In addition, Loop AI also respectfully requests that the Court impose certain prophylactic measures barring the turnover to substitute counsel of any confidential information or advice Sternberg shared with Almayiva or with anyone else regarding Loop AI or Orrick's work-product for Loop AI, including the agreements that are at issue in this action, and further providing that any person to whom Sternberg made such disclosure (e.g., counsel for other defendants in the case) be prohibited from using it.

Respectfully submitted,

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